United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

76-7295

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NEW YORK CITY TRANSIT AUTHORITY,

Appellant,

v.

CARL A. BEAZER, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. The United States will discuss the following questions:

Whether the district court erred in holding that the New York City Transit Authority's blanket policy barring all present and past methadone maintained persons from being employed in any position violates the due process and equal protection clauses of the Fourteenth Amendment because it had no rational relation to the demands of the jobs to be performed.

2. Whether the Transit Authority's policy violated Title VII of the Civil Rights Act, thereby permitting plaintiffs to recover attorneys' fees pursuant to that statute, 42 U.S.C. 2000e-5(k).

INTEREST OF THE UNITED STATES

The United States has made a major commitment to reduce or, if possible, eliminate the drug abuse problem in America. 1/ A major impetus for the treatment efforts which are a part of the commitment was the enactment on March 21, 1972, of the Drug Abuse Office and Treatment Act of 1972, Pub. L. 92-255 (86 Stat. 65, et seq.). In section 101 of that Act Congress finds, inter alia:

> "(1) . . .
>
> (2) Drug abuse seriously impairs individual, as well as societal, health and well-being.
>
> * * * *
>
> (6) The success of Federal drug abuse programs and activities requires a recognition that education, treatment, rehabilitation, research, training, and law enforcement efforts are interrelated.
>
> * * * *
>
> (8) Control of drug abuse requires the development of a comprehensive, coordinated long-term Federal strategy

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1/ The commitment began in 1969. White Paper On Drug Abuse, A Report To The President From The Domestic Council Drug Abuse Task Force, Preface at p. IX (September, 1975).

that encompasses both effective law enforcement against illegal drug traffic and effective health programs to rehabilitate victims of drug abuse.

* * * *

(10) Although the Congress observed a significant apparent reduction in the rate of increase of drug abuse during the three-year period subsequent to the date of enactment of this Act, and in certain areas of the country apparent temporary reductions in its incidence, the increase and spread of heroin consumption since 1974, and the continuing abuse of other dangerous drugs, clearly indicate the need for effective, ongoing and highly visible Federal leadership in the formation and execution of a comprehensive, coordinated drug abuse policy." (Emphasis added.) (Paragraph (10) was added by Pub. L. 94-237, 90 Stat. 241.)

As indicated by the underscored references in the above quote, heroin addiction has one of the highest treatment priorities under the Federal strategy for combating drug abuse. 2/ Methadone maintenance is the most widely used method of treatment for heroin addiction and the Federal Government provides at least partial funding for the treatment of 42,162 (approx.) of the 73,783 (approx.) heroin addicts who are being treated with methadone in the United States. 3/

2/ White Paper, supra, at 69.

3/ Division of Scientific and Program Information, National Institute on Drug Abuse, The National Drug Abuse Treatment Utilization Survey (August 16, 1976) (period prevalence March 1, 1976 -- March 31, 1976). Dr. DuPont, Director of the National Institute on Drug Abuse testified in the district court that 60 percent of all heroin addicts in treatment in the United States are on methadone maintenance. Joint Appendix at 578a.

A critical aspect of the overall Federal treatment effort is vocational rehabilitation, since society's objective of altering a former addict's drug-using lifestyle is clearly linked to his ability to find and hold a job. [4] Toward this end, the federal regulations which establish conditions for the use of methadone in maintenance programs, 21 CFR §310.505, require the programs to provide rehabilitative and other social services, including employment placement, which will help the patient become a well functioning member of society (§310.505(b)(1)(ii)). However, this and other efforts by the Federal Government will not be successful unless the unwillingness of public and private employers to hire former drug abusers is overcome. [5] Congress has sought to remedy this problem with respect to civilian employment in the Federal Government by enacting section 413 of the Drug Abuse Office and Treatment Act of 1972 (21 U.S.C. 1180). [6] That section provides in pertinent part:

4/ White Paper, supra, at 77.

5/ See White Paper at 77 - 78.

6/ This statute is referenced in the district court opinion. 399 F. Supp. at 1051-52.

> "(c)(1) No person may be denied or deprived of Federal civilian employment or a Federal professional or other license or right solely on the ground of prior drug abuse.
>
> (2) This subsection shall not apply to employment (A) in the Central Intelligence Agency, the Federal Bureau of Investigation, the National Security Agency or any other department or agency of the Federal Government designated for purposes of national security by the President, or (b) in any position in any department or agency of the Federal Government, not referred to in clause (A), which position is determined pursuant to regulations prescribed by the head of such department or agency to be a sensitive position.
>
> (d) This section shall not be construed to prohibit the dismissal from employment of a Federal civilian employee who cannot properly function in the employment."

The scope of this or any other legislative response by the United States to the problem is limited, of course, by the constitutional restrictions on Congressional authority and, given the magnitude of the drug abuse problem and the resulting necessity for broad vocational rehabilitation efforts, it is clear that legislative efforts alone are not sufficient. Therefore, the United States has a significant interest in upholding the decision of the district court in this litigation. An affirmance of the decision below enhances the treatment and rehabilitative efforts to which the United States is committed by (1) establishing a legal precedent applicable to those employers who are subject to the

Fourteenth Amendment, and (2) providing encouragement to all potential employers to hire those former heroin addicts who receive methadone maintenance treatment.

STATEMENT OF THE CASE

This is a class action against the New York City Transit Authority (TA), the Manhattan and Bronx Surface Transit Operating Authority (MABSTOA), the New York City Civil Service Commission, the New York City Personnel Department, and certain officials of those governmental entities. The action challenges the blanket exclusion from any form of employment in the New York City subway and bus systems of all former heroin addicts participating in methadone maintenance programs, regardless of the individual merits of the employee or applicant. It is also alleged that this exclusionary policy is applied against former heroin addicts who have successfully concluded their participation in a methadone maintenance program.

The amended complaint alleges that the exclusionary policy violates the due process and equal protection clauses of the Fourteenth Amendment, and federal civil rights statutes, 42 U.S.C. §§1981 and 1983, because there is no legal basis for classifying all present and former methadone maintenance patients as unemployable for any position in the Transit Authority. The complaint also alleges that the exclusionary policy has a disparate impact on blacks and Hispanics, resulting in a violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e et seq. The amended complaint seeks declaratory and injunctive relief on behalf of the class,

and certain monetary relief on behalf of the four named plaintiffs.

After six days of trial the parties advised that they were virtually finished with the presentation of their evidence. The district court, expressing concern about the disproportionate array of proof in support of the plaintiffs, requested the parties to submit proposals for further witnesses. The result was an additional nine days of trial at which an exhaustive effort was made to probe the factual issues with experts having varying points of view. The court entered an opinion on August 6, 1975 (399 F. Supp. 1032), holding that the transit authority's policy barring all present and past methadone-maintained persons from being employed in any position violated the due process and equal protection clauses of the Fourteenth Amendment, thus entitling the plaintiffs to relief under that Amendment and under 42 U.S.C. §1983. The court did not reach the claims of racial discrimination under 42 U.S.C. §1981 and Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§2000e et seq.) and concluded that there was no showing of a right to relief against the New York City Civil Service Commission or the New York City Personnel Department or any officials of those two entities.

Plaintiffs subsequently renewed their application for relief under Title VII of the Civil Rights Act of 1964, admittedly, for the sole purpose of obtaining the benefit

of the Title VII provision authorizing the award of a reasonable attorney's fee to the prevailing party (42 U.S.C. §2000e-5(k)). On May 5, 1976, the court entered an opinion (414 F. Supp. 277) holding that plaintiffs were clearly entitled to an award of attorney's fees because the Transit Authority's exclusionary policy violated Title VII. The court found that the policy had a substantially greater impact on minority groups than on whites and that there was no business necessity for the policy.

A permanent injunction and judgment was entered on May 20, 1976, enjoining operation of the TA's policy. Decisions on the amount of plaintiffs' attorneys' fees and on the relief to be afforded the named plaintiffs were deferred. The TA was ordered to reevaluate the employability of the named plaintiffs without regard to its unlawful policy.

In response to the TA's report on the employability of the named plaintiffs, the plaintiffs filed documentation on what relief should be granted to the named plaintiffs and the members of their class, including class member Wright. Plaintiffs also moved for a determination of the TA's liability for attorneys' fees under the recently enacted 1976 Civil Rights Attorneys Fees Awards Act.

On January 28, 1977, the court entered an amended permanent injunction and judgment providing that: (1) the plaintiffs were entitled to an award for costs and attorneys'

fees under the 1976 Act, as well as Title VII, and that the award should be in the amount of $375,000; and (2) plaintiffs Diaz and Frasier were entitled to employment, but that Beazer, Reyes, and Wright were not.

On this appeal, the TA seeks review of both the court's original and amended judgments. Plaintiffs have cross-appealed from that part of the amended judgment which denied relief to Beazer, Reyes, and Wright.

ARGUMENT

I

THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT PROHIBIT THE IMPOSITION OF EMPLOYMENT CRITERIA WHICH HAVE NO RATIONAL RELATION TO THE DEMANDS OF THE JOBS TO BE PERFORMED, AND WHICH ARE APPLIED IN A DISCRIMINATORY MANNER.

The district court held that the Transit Authority's blanket ban against the employment of all present and past methadone maintained persons in any position is a violation of the due process and equal protection clauses of the Fourteenth Amendment and that individual consideration, or rules rationally related to certain classification of jobs are constitutionally required. 399 F. Supp. at 1058. The court applied this holding to new applicants for employment, and to existing employees threatened with termination. 399 F. Supp. at 1057. Because the Transit Authority's blanket prohibition plainly violates the equal protection clause of the Fourteenth Amendment with respect to both tenured and non-tenured individuals, our discussion primarily focuses upon that constitutional provision.[7/]

The general principle underlying the equal protection clause of the Fourteenth Amendment is that a governmental classification which distinguishes among groups of individuals must be founded upon a "reasonable basis". Thus, in Reed v. Reed, 404 U.S. 71, 76 (1971) the Chief Justice stated for a unanimous Court:

7/ The due process rights of current employees are noted infra, p. 14 n. 8.

> "A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation.' Royster Guano Co. v. Virginia, 253 U.S. 412, 415 [40 S. Ct. 560, 561 (1920)]" [Emphasis added.]

In Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175, 92 S. Ct. 1400, 1406 (1972) it is stated that the classification must have a "significant relationship" to a legitimate purpose.

In the instant case the transit authority sought to establish such a relationship by asserting the following bases for its blanket exclusionary policy: (1) A methadone maintenance patient embodies the underlying character defects which caused him to use heroin in the first place and, since maintenance treatment does not remedy these defects, there is a substantial risk that the patient will revert to heroin or other illicit drugs or alcohol abuse; (2) methadone causes significant adverse physiological effects which would seriously threaten the safe conduct of the transit authority's operations; and (3) there is no proven method for separating reliable methadone maintenance patients from the unreliable, so it is administratively necessary to have a blanket exclusionary policy. 399 F. Supp. at 1036. The district court rejected these assertions, finding, on the basis of substantial scientific and medical evidence, that

there were substantial numbers of persons on methadone maintenance who are as fit for employment as other persons and that the transit authority could screen methadone maintenance patients for the purpose of finding those employable patients in basically the same way as in the case of other prospective employees. 399 F. Supp. at 1048. Thus, the court concluded that the blanket exclusionary policy was not rationally related to the safety or other needs of the transit authority. 399 F. Supp. at 1036-1037. The court stated:

> "As in Sugarman v. Dougall, 413 U.S. 634, 93 S. Ct. 2842, 37 L.Ed. 2d 853 (1973), the problem is the TA's flat ban which goes beyond any rational or legitimate needs of the TA, and excludes persons just as qualified for employment as many who are hired by the TA."

It is clear that Sugarman requires a finding that the transit authority's blanket exclusionary policy violates the equal protection clause because it is irrationally over-inclusive, barring all present and past methadone maintained persons, regardless of their individual fitness for a particular job. See Crawford v. Cushman, 531 F. 2d 1114, 1123 (2nd Cir. 1976). See also Armstead v. Starkville Municipal Separate School District, 461 F. 2d 276 (5th Cir. 1972), holding that use of examination scores as an employment requirement for teachers violated the equal protection clause, in part, because the applicants' ability under other criteria was not considered if a minimum test score was not attained.

In addition, as the district court recognized (399 F. Supp. at 1058), the policy is arbitrary since it does not apply to others who present the same, and indeed, even greater risks. Thus, the district court found that persons with alcohol problems are not discharged, but are retained in service. Indeed, "a person with a drinking problem may actually be permitted to function in positions such as subway motorman under certain circumstances." (399 F. Supp. at 1057). If the Authority does not regard known problem drinkers as presenting a sufficient threat to safety to bar them from employment, it is clearly arbitrary to refuse employment on the ground of safety, to persons who do not even suffer from an existing disability, i.e., those who are participating in a methadone maintenance program. Indeed, this Court has squarely held, in Crawford v. Cushman, 531 F. 2d 1114 (2d Cir., 1976), that an employer may not attach uniquely harsh consequences to one type of disability. Thus, in Crawford, the Court invalidated, on equal protection grounds, a Marine Corps disability regulation because it allowed virtually all temporarily disabled marines to remain in the Corps except for pregnant women. That decision is directly applicable here, and requires the invalidation of the Transit Authority's policy at issue here.

Accordingly, the district court's holding that the policy violates the equal protection clause of the Fourteenth Amendment must be affirmed.[8/]

8/ Of course, as to those plaintiffs who are currently employees of the Transit Authority, they may claim the protection of the Due Process Clause as well, on the ground that their "property" interest in continued employment may not be divested without due process of law. Perry v. Sindermann, 408 U.S. 593 (1972). And where non-tenured employees have an "expectancy" of continued employment, they too have a due process right to freedom from arbitrary discharge. Perry v. Sindermann, supra.

II

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 PROHIBITS AN EMPLOYER FROM IMPOSING A SELECTION DEVICE WHICH HAS EFFECTS LIKE THE TRANSIT AUTHORITY'S POLICY

The appellants do not challenge most aspects of the district court's analysis which led it to the conclusion that the Transit Authority's policy with respect to present or former participants in a methadone maintenance program violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. (Supp. V) 2000e et seq. (see 414 F. Supp. at 278-279).

In this Court, the Authority raises two main arguments as to why the district court's judgment, insofar as it rested on Title VII, should be reversed.[9/]

First, it contends (Brief 22-23) that the racial impact of the challenged practice is de minimis because only about 24,000 blacks and Hispanics of the 3,000,000 in the New York Metropolitan area "would belong to plaintiffs' class" (id. at 23). This contention, for which no relevant authority is cited, finds no support in the language of the statute which prohibits

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9/ The Authority also suggests (Brief 22) that it "has demonstrated a sufficient business reason to overcome any claim of racial discrimination . . ." However, the district court, in its consideration of plaintiffs' constitutional claims, concluded that the Authority's blanket ban went well "beyond any rational or legitimate needs of the TA" (399 F. Supp. at 1058) and held that "[i]ndividual consideration, or narrower rules rationally related to certain classifications of jobs" were required (id.). In such circumstances, the Authority perforce could not meet the Title VII standard of business necessity. See, e.g., United States v. Bethlehem Steel Corp., 446 F. 2d 652, 662 (2nd Cir. 1971) ("Necessity connotes an irresistable demand").

all discrimination on account of race or national origin by covered employers and no support in the decisions of the courts. See, e.g., McDonnell-Douglas v. Greene, 411 U.S. 792 (1973) (one employee); McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976) (two employees).

Second, the Authority argues (Brief 23-25) that there was no evidence that the challenged policy was adopted or is continued for a racially discriminatory purpose. Therefore, the argument runs, Washington v. Davis, 426 U.S. 229 (1976), a constitutional case, precludes finding the Authority's program illegal. However, the Court in Washington explicitly noted that the applicable standard in Title VII cases was "more rigorous" than that in constitutional cases (426 U.S. at 247), and Griggs v. Duke Power Co., 401 U.S. 424 (1971) thus remains the binding authority in this area. Therefore, appellants do not suggest any appropriate reason why their policy was not properly found to violate Title VII under the Griggs standard, and, accordingly, the portion of the judgment predicated on a violation of Title VII should be affirmed.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment below holding (1) that the Transit Authority's blanket exclusionary employment policy violates the due process and equal protection clauses of the Fourteenth Amendment, and (2) awarding attorneys fees under Title VII of the Civil Rights Act.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of April, 1977, I served the foregoing Brief Amicus Curiae upon counsel listed below, by causing copies to be mailed, postage prepaid, to:

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